IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

WRIT PETITION NO.9651 OF 2004

Man Industries India Ltd.)
Man House, 15PU-3, Scheme No.54)
A.B. Road, Indore-452 008)..Petitioner

Versus

1.M/s.N.V.Kharote Engineer &)
Contractors, a Partnership)
firm having its office at)
S.No.3/2, Plot No.1, Near)
Civil Defence Training Centre)
Pune-411 009)
2. Bank of Maharashtra, Laxmi)
Road Branch, Pune-411 002.)..Respondents

Mr. Anil Menon, for the Petitioner
Mr.S.J.Rairkar, for Respondent No.1.
Mr. Girish Kulkarni, for Respondent No.2.

CORAM : S.A.BOBDE, J.
DATED : 23RD JUNE, 2005

ORAL JUDGMENT:

1. The petitioner company, hereinafter referred to as the "Company", has challenged the impugned order of the 6th Adhoc Additional District Judge, Pune, in Miscellaneous Appeal No.150 of 2004 upholding the judgment of the 4th Joint Civil Judge, Junior Division, Pune, restraining the respondent No.2, Bank of Maharashtra, from paying the amounts guaranteed under the two bank guarantees. The bank guarantees have been executed by the Respondent No.2 bank,

hereinafter referred to as the "Bank", at the instance of the Respondent No.1 i.e. M/s.N.V. Kharote Engineers & Contractors, hereinafter referred to as the "Contractors".

2. The Respondent No.1 placed orders on 10th March, 2003 for supply of 1422 mm dia, OD 2 mm thick M.S., Spirally welded pipes for 500 running meters (RMT) @ Rs.9591/- per meter. The total value of this order was Rs.47,95,500/-. The delivery of the said pipes was to be made by the end of March, 2003. In regard to this purchase bank guarantee No.K5/03-04 dated 6th May, 2003 was executed by the Respondent No.2 bank assuring payment of the sum of Rs.50,00,000/-.

3. The respondent No.1 placed another orders on 3rd April, 2003 the petitioner, thereinafter referred to as the Company for supply of 813 mm dia. OD 8 mm thick M.S., Spirally welded pipes for quantity 5270 RMT @ Rs.3930/- per meter. The total value of this order was Rs.2,07,11,100/-. This order was revised to 4820 RMT. The bank guarantee No.K02/03-04 dated 17th April, 2003 was executed by the Respondent No.2 bank at the instance of the Contractor in favour of the Company.

4. As regards the terms of the payment in advance it seems that some terms of payment were modified and these bank guarantees were executed in lieu of advance as is

expressly stated at the head of the bank guarantees themselves. It appears that the Contractor has in the plaint admitted that spiral welded pipes, having length of 47891.82 RMT, worth Rs.2,30,13,813.82 were supplied by the company to the contractor. According to the company they manufactured spiral welded pipes worth Rs.2,76,78,204/- and the contractor has paid them a sum of Rs.2,31,55,370/-. A sum of Rs.45,22,834/- is said to be due to the company from the contractor. These pipes are hereinafter referred to as "goods".

5. It appears that some disputes arose between the parties regarding amounts outstanding and the company made an attempt to encash the bank guarantees. It made a demand in writing on 25th July, 2003. The contractor, therefore, filed the suit on 26th July, 2003. In the suit they applied for temporary injunction restraining the bank from making payment to the company under the aforesaid bank guarantees. The trial Court granted status quo initially and thereafter confirmed the injunction on 19th April, 2004. The Appeal carried by the Company was dismissed on 26th October, 2004. The Appellate Court upheld the injunction granted by the trial Court.

6. Mr. Menon, learned Counsel for the petitioner questioned the orders of the Courts below primarily on the ground that the bank guarantees were unconditional and the

demand made by the company was made conclusive in regard to the amount due and payable by the bank and,therefore, no injunction could have been granted.

7. Mr. S.J. Rairkar, learned Counsel for the contractor vehemently submitted that the bank guarantees must be construed as conditional. According to the learned counsel, they were made conditional upon the supply of goods and, therefore, they could not have been invoked. The learned Counsel submitted that the petitioner company has not supplied all the goods referable to the two purchase orders and, therefore, they are not entitled to invoke the bank guarantees.

8. It is, therefore, necessary to construe the terms of the guarantees themselves. They are both identical. The only difference being that they refer to two different purchase orders and secure different amounts.

. The important features of the guarantee are that they guarantee payment of a fixed sum. Bank guarantee No.K02/03-04 guarantees an amount of Rs.25.00 lakhs and the other guarantee i.e. bank guarantee No.K5/03-04 guarantees an amount of Rs.50.00 lakhs. The amount is expressly made payable on production of the bank guarantee accompanied by a specific written demand for invocation of the bank guarantee on account of default and/or non-payment by buyer to the

manufacturer/supplier for the goods supplied by the manufacturer/supplier to the buyer. The guarantee further stipulates as under:-

> "Any such demand made by the Manufacturer/Supplier shall be conclusive in regard to the amount due and payable by Bank of Maharashtra without any hesitation and delay under this guarantee."

It further states that :-

> "This Bank Guarantee shall not be invoked for any other reason by Manufacturer/Supplier except for default and/or nonpayment by Buyer to Supplier for the goods supplied by Manufacturer/Supplier to Buyer."

The Bank Guarantee ends with an important clause which reads as follows:-

> "Notwithstanding anything contained herein:
>
> (a).....
>
> (b)..... And
>
> (c) We are liable to pay guaranteed amount or any

part there of under this Bank Guarantee only and only if you serve upon as A written claim or demand on or before 16th July, 2003."

It was, therefore, contended on behalf of the Company that the guarantee is a unconditional guarantee and no injunction could have been granted . On a true construction of the bank guarantee it appears that they are intended to be unconditional guarantees, not made dependent on the extent of goods supplied by the company to the Contractor. Indeed ex-facie the bank guarantees have been executed at the instance of the contractor in lieu of the payment of advance and it specifically stipulates that any demand made by the Manufacturer/Supplier shall be conclusive in regard to the amount due and payable by the Bank of Maharashtra without any hesitation and delay under this guarantee. Another term, which is usual in bank guarantees, also exists in this bank guarantee whereunder the bank has agreed and undertaken to pay the amount due and payable under the guarantee "without any demur on production of this Bank Guarantee."

9. It is true as contended by Mr. Rairkar, the learned Counsel for the Contractor that the guarantee shall not be invoked for any other reasons except for default and/or non-payment by the contractor to the company for the goods supplied by the Company. The learned Counsel places great emphasis on the words "for the goods supplied by the

company." Therefore, in the submission of the learned Counsel for the Respondent No.1 any deficiency in supply of the goods would render the bank guarantee inoperative. This is clearly not the case here. Admittedly, this is not a case where the goods have not been supplied by the company. In fact, as pointed out earlier, goods worth Rs.2,31,55,370/- have been supplied. Even according to the contractor the dispute is as to the goods worth Rs.45,22,834/-. Thus clearly what is in dispute is not the fact whether the goods have been supplied by the company, but the extent of the goods supplied. On a true construction of the clauses in the bank guarantees I am of view that the bank guarantees can be encased if there is any default and/or non-payment for the goods supplied by the company to the contractor. Notwithstanding some deficiency in the extent of supply of goods. These bank guarantees are in fact in lieu of advance payable by the contractor. In this regard it is of consequence that on 2nd July, 2003 the Contractor wrote to the company referring to the company's anxiety due to non-payment of its dues worth about Rs.60. lakhs. There is no dispute about this letter. Even otherwise it is clear that the mere existence of these clauses does not make the bank guarantee liable to be construed as a conditional guarantee in view of the specific clause that the bank has guaranteed payment without any demur on production of this bank guarantee accompanied by a specific demand by the company and further that such a

demand shall be conclusive in regard to the amount due and payable by Bank of Maharashtra without any hesitation and delay under this guarantee. As observed earlier the guarantee ends with the non-obstnate clause which provides that notwithstanding anything contained in the guarantee the bank is liable to pay the guaranteed amount or any part thereof under this bank guarantee. In this view of the matter it is clear that the bank guarantee is a unconditional guarantee. Admittedly though pleaded, the Courts below have not recorded any finding of fraud by the company either on the bank or on the contractor.

10. As far as the law is concerned, the learned Counsel for the respondent relied on the decision of the Supreme Court in Hindustan Construction Co. Ltd. v. State of Bihar, reported in [(1999) 8 SCC 436] where the Supreme Court took the view that the bank guarantee can be encashed only in accordance with its terms and that it was not so encashed in that case. There clause 9 of the contract between the parties provided that loan advanced to the contractor would be used by him exclusively for mobilisation expenditure, including the acquisition and construction of the plant, in connection with the works. Should the contractor misappropriate any portion of the advance loan, it was provided that the amount shall become due and payable immediately. Therefore, the Supreme Court took a view that even though the bank guarantee used the expression "agree

unconditionally and irrevocably" these expressions are immediately clarified by the following:-

> "....in the event the obligations expressed in clause 9 of the original contract have not been fulfilled by the contractor giving the right of claim to the employer for recovery of the whole or part of the advance mobilisation loan from the contractor under the contract."

In view of the fact that the bank guarantees were invoked, not on the ground that the advance had been used for other than the specified purpose, but on the ground that the construction company at whose instance the bank guarantee was given had not adhered to the Schedule III and it abandoned it, the Court held that the alleged bank guarantee was not encashed in accordance with the terms.

11. I am of the view that the above decision is of no assistance to the contractor in this case. In the present case the bank guarantee is unconditional for the reasons stated above. Even otherwise the conditions stipulated in the bank guarantee namely that it will become encashable if there is a default for payment for the goods supplied has also been attracted in the present case. As observed earlier admittedly the goods worth Rs.2,31,55,370/- have been supplied by the company to the Contractor. I see no

force in the contention on behalf of the respondent that the condition assuming this to be a conditional guarantee, would be attracted and the bank guarantee would not be encashable unless all the goods are supplied. It must be noted that it is settled law that any dispute pertaining to the underlying contract between the parties is not relevant for considering the obligation of the bank to make payment. Indeed there could be a variety of reasons for disputing the liability under the contract between the parties such as rejection of certain goods on the ground of quality or not adhering to the schedule or delivery or supply. Such disputes must be kept out of consideration. This Court had an occasion to consider this aspect in the decision reported in the case of **Hagglunds Drives & Anr. v. National Heavy Engineering Co-operative Ltd., Pune and Anr., AIR 2002 Bom.305** where this Court observed as under:-

> "12. Insofar as the question of the grant of an injunction against the encashment of a Bank Guarantee is concerned, the law on the subject is settled by several judgements of the Supreme Court. The issuing Bank is bound to observe and honour the terms of the guarantee. The beneficiary of a Bank Guarantee cannot be restrained from invoking the Bank Guarantee, and the issuing Bank cannot be injuncted from paying over the proceeds of the Bank Guarantee save and except in the case of fraud which vitiates

the entire underlying transaction or in a case where irretrievable injustice would be caused by the invocation or the encashment of the Bank Guarantee. The issuing Bank is not concerned with the terms of the underlying transaction between the beneficiary of the Bank Guarantee and the person at whose behest the Bank Guarantee was issued by the issuing Bank. The Bank Guarantee is a bipartite contract between the issuing Bank and the beneficiary. The Bank is not a party to the underlying contract between the beneficiary and the person at whose behest the Bank Guarantee is issued. The Bank Guarantee in that sense is regarded in law as independent of the underlying transaction. Disputes which arise between the beneficiary of the guarantee and the person at whose behest the Bank Guarantee has been issued by the issuing Bank are of no concern to the Bank. Where the Bank assumes an obligation to pay on demand without demur, without reference to the underlying dispute, if any, between the parties, it must honour the terms of its obligation. Oil and Natural Gas Ltd. vs. SBI, Overseas Branch, Bombay, (2000) 6 SCC 385; (AIR 2000 SC 2548); Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineering Works (P) Ltd., (1997) 5 JT (SC) 417; (AIR 1997 SC 2477); Hindustan Steelworks Construction Ltd. v. Tarapore and Co. (1996) 5 SCC 34; (AIR 1996 SC 2268); State of

Maharashtra v. National Construction C;. (1996) 1 SCC 735; (AIR 1996 SC 2367); Ansal Engineering Corpn. Ltd. (1996) 5 SCC 450; U.P. State Sugar Corpn. v. Sumao International Ltd., (1997) 1 SCC 568;; (AIR 1997 SC 1644); National Thermal Power Corpn. Ltd. v. Flowmore (P) Ltd. (1995) 4 SCC 515; (AIR 1996 SC 445); Larsen and Tubro Ltd. v. Maharashtra S.E.B. (1995) 6 SCC 68; (AIR 1996 SC 334) and Hindustan Steel Works Construction Ltd. v. G.S. Atwal and Co. Engineering Pvt. Ltd. (1995) 6 SC 76; (AIR 1996 SC 131)."

In this view of the matter, I am of the opinion that the contractor has not made out any prima facie case for grant of an injunction against the bank from making payment under the guarantee. It is clear having regard to the letter dated 2nd July, 203 that no irretrievable injustice would be caused to the contractor since even according to the Contractor it appears that an amount of Rs.60.00 lakh was due and payable on 2nd July, 2003. For the same reasons the balance of convenience cannot be said to lie in favour of the respondent contractor. In fact it must be noted that the Appellate Court has not rendered any finding of fraud and has in fact not even pointed out a specific condition which is said to make the bank guarantee conditional.

12. In this view of the matter, I am of the view that the

findings of the Courts below call for interference since they are contrary to law laid down by the Supreme Court in respect of encashment of Bank Guarantee and on a true construction of the guarantees. The order, therefore, suffers from an error of law apparent on its face and the temporary injunction granted by the Courts below is, therefore, set aside.

13. Rule is made absolute in above terms.

14. Mr. Rairkar prays for stay of this order. In view of the fact that an injunction has been operating in favour of the Respondent No.1 for 23 months, there shall be a stay of this order for a period of eight weeks from today.

Sd/-

(S.A. BOBDE, J.)